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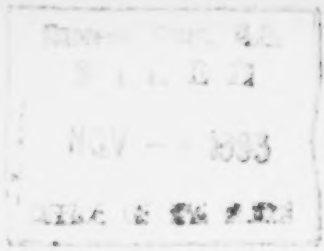

Case No. _____

In The
SUPREME COURT of the UNITED STATES

October Term, 1993

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HARLINE K. GEORGE, et al.,

Petitioner,

v.

LEONARD ZLOTOFF and
LOIS ZLOTOFF,

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

==========

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November, 1993

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Question Presented for Review:

Is A Creditor's State Court Enforcement Of A "Pay All Bills" Provision In A Corporate Stock Sales Agreement Preempted By The National Labor Relations Act?

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

==========

Harline K. George, now known as Harline K. Prochazka (hereinafter referred to as "George" or "Petitioner") respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Fourth

Appellate District, Division One, entered in this proceeding on May 12, 1993.

OPINIONS BELOW

The Supreme Court of the State of California denied George's Petition for Review on August 11, 1993. The Opinion of the California Court of Appeal, Fourth Appellate District, Division One, is neither officially nor unofficially reported; the Opinion is set forth in full in Appendix "A" to this Petition. The Order And Judgment On Defendants' Motion For Judgment On The Pleadings of the Superior Court, San Diego County, is neither officially nor unofficially reported, and is set forth in full in Appendix "B" to this Petition.

JURISDICTION

On May 12, 1993, the California Court of Appeal entered its decision affirming

the Judgment and Order of the Superior Court of the State of California, in and for the County of San Diego. On August 11, 1993, the Supreme Court of the State of California denied George's Petition for Review. The California Supreme Court's denial of George's Petition for Review was, in effect, an affirmation of the decision of the Court of Appeal. As the Court of Appeal was the highest court to issue a written decision, this Petition, by its title, seeks a writ of certiorari to the California Court of Appeal. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC §1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are:

A. The National Labor Relations Act, as amended, Sections 2, 7, 8(a), 10(a),

and 10(b) (respectively, 29 U.S.C. §§ 152, 157, 158(a), 160(a) and 160(b)).

B. The Labor Management Relations Act, as amended, Section 301(a) (29 U.S.C. § 185(a)).

These provisions are set forth in full in Appendix "C" hereto.

STATEMENT OF THE CASE

In August of 1980, the employees of Aztec Bus Lines, Inc. went on strike. One of these employees was Petitioner George. After seven months on strike, the employees made an unconditional offer to return to work. The corporation, Aztec Bus Lines, Inc., refused to reinstate any of the employees, including George.

An Administrative Law Judge of the National Labor Relations Board (hereinafter "NLRB") determined that Aztec Bus Lines, Inc.'s refusal to reinstate George was an unfair labor practice. The

resulting Order included a mandate to Aztec Bus Lines, Inc. to reinstate George with full backpay and benefits. That Order was confirmed by the NLRB on July 22, 1988.

That NLRB Order was confirmed by the United States Court of Appeals, District of Columbia Circuit, in San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union v. National Labor Relations Board, Case No. 88-1533 (D.C. Cir. 1989) (before: Mikva, Edwards and Ruth B. Ginsburg, Circuit Judges).

At the end of 1986, Leonard Zlotoff and Lois Zlotoff ("Zlotoffs" or "Respondents") owned virtually all of the corporate stock of Aztec Bus Lines, Inc. At that time, the Zlotoffs entered into a stock purchase agreement with James V. Pike. That agreement provided that the Zlotoffs, as sellers of corporate stock, would be personally liable for all of the

then-existing liabilities of Aztec Bus Lines, Inc. The relevant contractual provision stated in full: "It is the intent of the parties that Seller [the Respondent] bear the liabilities existing as of December 31, 1986, and buyer [Pike] bears the risk of operations thereafter." (Complaint for Damages and Breach of Contract, filed on December 28, 1990.) The obvious intent of that provision was that Pike would purchase the corporation free and clear of any previous debt.

On or about March 20, 1990, Aztec Bus Lines, Inc. ceased to exist; Aztec Bus Lines, Inc. effected an Assignment for the Benefit of Creditors, which, in California, is tantamount to a liquidation under a Chapter 7 bankruptcy.

When George received notification of the Assignment for Benefit of Creditors, it became clear that there was no longer any hope that Aztec Bus Lines, Inc. would,

or could, act on the NLRB Order to reinstate her with backpay and benefits.

Subsequently, on December 28, 1990, Petitioner George sued the Respondents (the Zlotoffs) for breach of their stock purchase agreement with Pike, under a third party beneficiary theory. George alleged that Aztec Bus Lines, Inc. was indebted to her for backpay and benefits through December 31, 1986 pursuant to the reinstatement order of the NLRB as confirmed by the U.S. Court of Appeals, D.C. Circuit. George's complaint further alleged that Aztec Bus Lines, Inc. was indebted to George at the time of the Zlotoffs' stock purchase agreement with Pike. George also alleged that when the Zlotoffs agreed to pay all of Aztec Bus Lines, Inc.'s corporate debts, that pool of debts included the corporation's financial obligation to George, through December 31, 1986.

The Zlotoffs' liability to George terminated as of December 31, 1986 because the Zlotoffs' stock purchase agreement with Pike cut off their liability as of that date. Thus, George did not seek damages in her complaint beyond the date specified in the stock purchase agreement.

Moreover, George did not seek reinstatement from the Zlotoffs, or from any other party or entity, for the NLRB had previously determined there was no successor employer to Aztec Bus Lines, Inc. in NLRB Case No. 21-CA-27670.

Subsequent to Petitioner George's complaint, the Respondents filed an answer which did not raise federal preemption as an affirmative defense. The Respondents subsequently moved the superior court for judgment on the pleadings, on the sole ground that George's complaint to enforce the stock purchase agreement between investors was preempted by the NLRB. The

superior court accepted the Respondents' assertion and granted their motion for judgment on the pleadings; the court's Order and Judgment thereon was filed on January 6, 1992.

The Order and Judgment stated, in relevant part, "Motion for Judgment on the Pleadings granted without leave to amend as Court finds the present action is arguably within the jurisdiction of the National Labor Relations Board."

Petitioner George filed a Notice of Appeal on March 5, 1992. After briefing and oral argument by the parties, the court of appeal affirmed the superior court judgment, by a decision filed May 12, 1993. The court stated its conclusion that:

> The preemption doctrine of San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. 236, applies to conduct or activity which is arguably protected or arguably prohibited by the NLRA. The preemption doctrine applies to George's

> complaint because her lawsuit essentially seeks enforcement of an NLRB order, a matter governed by the NLRA. Thus, the superior court properly concluded George's complaint was preempted as arguably within the jurisdiction of the NLRB. The superior court correctly granted judgment on the pleadings favoring Zlotoff.

Decision of the Court of Appeal, p. 16-17 (Appendix A-16 through A-17 hereto).

This decision of the court of appeal represents a conflict with decisions of this United States Supreme Court, as there is no federal preemption of a creditor's state court enforcement of a stock purchase agreement under the circumstances of this case. Accordingly, George now brings this petition for certiorari.

REASONS FOR GRANTING THE WRIT

Our system of federalism mandates that local governments maintain control over local affairs, and that our federal government refrain from unwarranted interference in those local affairs. It

is only under limited and specific circumstances that the federal system will preempt a local concern. Those circumstances do not exist in the present case for the reasons advanced below.

A. The Decision Appealed From Conflicts With United States Supreme Court Decisions On NLRB Preemption.

This Supreme Court expressed its NLRB preemption doctrine in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1958) as follows:

> When an activity is arguably subject to §7 and §8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245, referencing 29 U.S.C. §157 and §158, respectively.

By its language, the Garmon preemption doctrine applies only to state

or federal court efforts to regulate activity, or conduct, when that conduct is arguably protected or prohibited by the National Labor Relations Act ("NLRA"). Further, not all activity or conduct that fits into the "arguably protected or prohibited" category is preempted -- subsequent Supreme Court case law has shown that the courts may in fact regulate some such activity or conduct, under an ever-growing set of circumstances.

Just as the Garmon preemption doctrine applies only to matters which involve activity or conduct, Garmon does not apply to other areas, such as the contractual breach at issue in Petitioner George's complaint.

This Court has held that state courts may continue to regulate matters of vital public importance, even if those matters peripherally touch on federal law. E.g. Sears, Roebuck & Co. v. San Diego County

District Council of Carpenters, 436 U.S. 180, (1978) (state claim of trespass not preempted); Farmer v. United Brotherhood of Carpenters, Local 25, 430 U.S. 290 (1977) (no preemption of several tort claims); Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel not preempted); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence not preempted); Machinists v. Gonzales, 356 U.S. 617 (1958) (no preemption of wrongful expulsion from union meeting).

Thus, the NLRB does not automatically preempt any case which has a remote connection to the NLRA. In particular, for the NLRB to preempt the instant case, there would have to be a "Yes" answer to the following question: Is the breach of a stock purchase agreement between investors arguably protected or arguably prohibited by the NLRA?

Posing this question reveals that Garmon does not apply to the breach of a sales contract, nor could it -- for the simple reason that there is no activity involved within the meaning of Garmon. Moreover, as the NLRB would only have jurisdiction over labor organizations and employers (not investors), the NLRB could not assert jurisdiction over George's complaint because Aztec Bus Lines, Inc. no longer exists and there is no successor employer. Thus, the NLRB has no power to determine the issues in George's complaint.

The NLRB has clearly defined and explicitly limited jurisdiction. It has power only to enforce the National Labor Relations Act, specifically §7 and §8 of that Act (29 U.S.C. §157 and §158, respectively); it does not have the power to enforce stock purchase agreements between investors. Primarily, the NLRB

enforces the law with respect to the relationship between labor unions and employers engaged in interstate commerce (29 U.S.C. §152). This limited NLRB jurisdiction does not stretch to include the power to enforce or even analyze a stock purchase agreement between investors.

There is a clear policy behind NLRB preemption of courts' efforts to regulate conduct between unions and employers. That policy, as stated in Garmon, supra, is to avoid state interference with national policy.

However, there is absolutely no potential for a state court decision to conflict with an NLRB decision, because Aztec Bus Lines, Inc. is now non-existent and there is no successor employer.

Moreover, there is no possibility that a state court decision could conflict with NLRB law or policy, as George's

complaint did not seek to compel anything other than the payment of money, and only for the period covered by the stock purchase agreement: there was no conduct involved whatsoever; George did not ask for reinstatement; George did not ask for damages beyond the cut-off date of the Zlotoffs' obligation in the stock purchase agreement. Clearly, then, George did not seek enforcement of the NLRB Order, for that would have entailed a much broader remedy, including reinstatement, restoration of seniority rights, and continuing backpay.

Further, even if the breach of a stock purchase agreement could somehow be characterized as having a remote relationship to the NLRA, any such relationship would be completely peripheral and thus not subject to preemption.

Accordingly, the lower court's

decision that the NLRB preempted George's state court breach of contract complaint was in conflict with U.S. Supreme Court authority.

B. **The Issue Was One Of First Impression In The California Courts.**

The issue presented to the California courts appears to have been one of first impression. Petitioner George undertook an extensive search of state and federal law in an effort to locate any authority for the proposition that a stock purchase agreement between investors would or would not implicate questions of federal labor law. That search did not reveal even one case where this issue was presented to a state court, a federal court or to the NLRB.

Presumably, the Respondents were also unable to locate any such case law, as they did not cite to any relevant

authority in the state court proceedings.

Moreover, neither the court of appeal nor the superior court cited to any authority on this precise question. In fact, the decision of the California court of appeal did not address at all the fact that the NLRB would have no jurisdiction to enforce a stock purchase agreement between investors. It appears that the appellate court relied solely on the cases cited by the Respondents, all of which were inapposite as they pertained to employers -- but not investors.

It thus appears that this issue was one of first impression for the courts.

C. **This Court's Decision Is Necessary To Secure Consistency With U.S. Supreme Court Decisions.**

Due to the complete absence of any case law on the issue of NLRB preemption of the enforcement of stock purchase

agreements, this Court's decisions on parallel issues have particular significance. The ample case law on parallel questions has found more and more areas are not preempted by the NLRB.

The most directly related Supreme Court cases are those involving employment contracts, labor organizations, employers, and unfair labor practices. Reference to these employment cases is particularly useful, for if employment cases are not preempted, then surely Petitioner George's complaint to enforce a stock purchase agreement between investors should not be preempted.

In Smith v. Evening News Association, 371 U.S. 195 (1962), Smith sued his employer, the Evening News Association, on behalf of himself and 49 other similarly situated employees. Smith's suit was for breach of contract, brought in the [state] circuit court of Wayne County, Michigan.

Smith's complaint alleged, inter alia, that the employer violated a clause in the collective bargaining agreement between the employer and the Newspaper Guild of Detroit, which provided: "There shall be no discrimination against any employee because of his membership or activity in the Guild."

The respondent employer moved to dismiss the breach of contract complaint for lack of jurisdiction on the ground that the allegations of the complaint, if true, would constitute an unfair labor practice under the Labor Management Relations Act ("LMRA"). The State Court sustained the employer's motion to dismiss and agreed that the subject matter was within the exclusive jurisdiction of the NLRB. Id. at 196.

The Michigan State Supreme Court affirmed the trial court's dismissal, relying upon the Garmon preemption rule.

The United States Supreme Court granted certiorari. In its Evening News decision, this Honorable Court referenced its prior decisions in Teamsters v. Lucas Flour, 369 U.S. 95 (1962), Dowd Box Company v. Courtney, 368 U.S. 502 (1962) and Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962). Each of these cases recognized the jurisdiction of courts, as opposed to the NLRB, to enforce collective bargaining agreements, even when the action allegedly violating the agreement might also be an unfair labor practice.

The three cases referenced by this Court in Evening News, Lucas Flour, Dowd Box, and Atkinson, were suits upon collective bargaining agreements which were brought, or held to arise, under the Labor Management Relations Act, Section 301(a), 29 U.S.C. §185(a) (hereinafter "Section 301"). In each case, the jurisdiction of the courts was sustained

even though the conduct involved was arguably protected or prohibited by the LRMA. Moreover, in Lucas Flour, as well as in Atkinson, this Supreme Court noted its previous refusal to apply the Garmon preemption doctrine in a wide variety of circumstances. Evening News, supra, at 371 U.S. 197-198.

In Evening News, after this Court conducted the above review of its own decisions, it once again refused to hold that the Garmon preemption doctrine prevented a court from enforcing a contract; Garmon would not apply even "where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board," as well as a breach of a contract. Evening News, supra, at 371 U.S. 197 (emphasis added).

Further, "The authority of the Board

to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." Id. at 197 (emphasis added).

Smith v. Evening News does not stand alone. In Vaca v. Sipes, 386 U.S. 171 (1967), this Court recognized the primacy of the courts, and not the NLRB, in interpreting agreements:

> There are also some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. §301 charging an employer with a breach of contract. . . . If an employee is discharged without

> cause, either the union or the employee may sue the employer under L.M.R.A. §301. Under this section, courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract is also arguably an unfair labor practice within the jurisdiction of the NLRB. Garmon and like cases have no application to §301 suits. Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646.

Vaca v. Sipes, 386 U.S. 171, 183-184 (1967). (emphasis added)

And, again, this Court in Vaca stated:

> Moreover, the Board would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employees without remedies for the union's wrong. (footnote omitted) Given the strong reasons for not pre-empting duty of fair representation suits in general, and the fact that the courts in many section 301 suits must adjudicate whether the union has breached its duty, we conclude that the courts may also fashion remedies for such a breach of duty.

Vaca v. Sipes, supra, 187-188 (emphasis added).

The Supreme Court has not backed away from its insistance that the enforcement of contracts is the exclusive province of the courts. In Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67 (1989), this Court affirmed its Vaca holding. Simultaneously, in Breininger, this Court reemphasized its earlier decision in Bowen v. U.S. Postal Service, 459 U.S. 212, 222 (1983), citing itself for the proposition that the right of the individual employee to be made whole is "[o]f paramount importance." 493 U.S. 75.

Thus, even in cases directly involving the employment relationship, and even when the conduct at issue is concededly an unfair labor practice, this Court has not found reason to require NLRB preemption to prevent the courts from enforcing a contract. Enforcing contracts is, absolutely, a judicial function.

Petitioner George's cause of action in the court below should have been allowed to proceed.

D. There Are No Policy Reasons To Assign Contract Interpretation To The NLRB As The Board Has No Expertise In That Area.

Case law reveals that the NLRB has no particular expertise in interpreting contracts -- even if the contract at issue is a collective bargaining agreement (unlike the stock purchase agreement at issue in the instant case). In fact, the U.S. Supreme Court has repeatedly reviewed the NLRB's lack of expertise and lack of jurisdiction to enforce contracts.

One such case is National Labor Relations Board v. C & C Plywood Corporation, 385 U.S. 421 (1967). In C & C Plywood, the United States Supreme Court considered whether the NLRB had

jurisdiction over a union's charge that an employer violated the collective bargaining agreement and committed an unfair labor practice by unilaterally instituting a premium pay plan.

The employer in C & C Plywood argued that the NLRB could not, under any circumstances, analyze a collective bargaining agreement. According to that employer, the Board's authority was strictly limited to determining whether an unfair labor practice had occurred.

This Supreme Court expressly noted that in the case then before it, the NLRB had not had to construe the terms of the labor agreement to determine the respective contractual rights at issue, so the Board had not imposed its own view of the terms and conditions of the labor agreement. All the Board did was:

> merely enforce a statutory right which Congress considered necessary to allow labor and

> management to get on with the process of reaching fair terms and conditions of employment . . . . The Board's interpretation went only so far as was necessary to determine that the union did not agree to give up those statutory safeguards. Thus, the Board, in necessarily construing a labor agreement to decide this unfair practice case, has not exceeded the jurisdiction laid out for it by Congress.

C & C Plywood, supra, at 385 U.S. 428

Thus, even when the NLRB considers the terms of a collective bargaining agreement, it has no power to interpret those provisions; accordingly, it does not, and cannot, develop expertise in that area.

In C & C Plywood, this Court agreed with the employer that contract interpretation was not a matter for the NLRB. By the same analysis, Petitioner George's state court complaint would not have been appropriate for the NLRB, since it involved interpreting a stock purchase agreement under California law.

CONCLUSION

For all of the reasons advanced above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HARLINE K. GEORGE,

Plaintiff and Appellant,

v.

LEONARD ZLOTOFF et al.,

Defendants and Respondents.

No. D016457

(Super. Ct. No. 632268)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. O'Neill, Judge. Affirmed.

Plaintiff Harline K. George appeals a judgment on the pleadings favoring Leonard Zlotoff and Lois Zlotoff (together Zlotloff) on George's complaint for breach of contract. George contends the superior court erred in determining the National

Labor Relations Act (NLRA) (29 U.S.C. §151 et seq.) preempted George's lawsuit. We affirm the judgment.

I

FACTS

In September 1979 Augustus Zemba bought the stock of Aztec Bus Lines, Inc., from Zlotoff under an installment sales contract. After the sale, Zlotoff continued as a director of Aztec and received regular contractual payments from Zemba. Zlotoff continued to own the real property where Aztec's bus yard was located and leased the premises to Zemba. Zlotoff also retained an interest in some of Aztec's rolling stock.

George worked as a bus driver for Aztec. For collective bargaining purposes, Bus Drivers Local Division 1309 of the Amalgamated Transit Union, AFL-CIO (Union), represented George.

On August 23, 1980, Aztec employees

including George went on strike.

In April 1981 George and other striking employees offered unconditionally to return to work.

On September 30, 1982, a National Labor Relations Board (NLRB) administrative law judge found Aztec violated sections 8(a)(1) and 8(a)(3) of the NLRA by not reinstating George and others. The decision ordered Aztec to reinstate George and others with pack pay and benefits from April 4, 1981, until reinstatement. The matter was then transferred to and continued before the NLRB in Washington, D.C.

Meanwhile, Aztec did not reinstate George to her position as bus driver or pay her back wages or fringe benefits.

When Zemba defaulted on installment payments, Zlotoff regained Aztec.

On December 31, 1986, Zlotoff owned 900 of Aztec's 1,000 common stock shares.

Zlotoff agreed in writing to sell those shares to James Pike. The stock purchase agreement provided in part: "It is the intent of the parties that Seller [Zlotoff] bear the liabilities existing as of December 31, 1986, and Buyer [Pike] bears the risk of operations thereafter."

On July 22, 1988, the NLRB affirmed the portion of the administrative law judge's 1982 decision ordering Aztec to reinstate George with back pay.

On July 27, 1989, the United States Court of Appeals for the District of Columbia Circuit confirmed the NLRB award.

On September 12, 1989, the United States District Court for the Southern District of California entered judgment favoring the Union against Aztec requiring compliance with orders of the NLRB including reinstatement and back pay.

On March 20, 1990, Aztec effected an assignment for the benefit of creditors

through the Hamer Group as assignee. The Hamer Group advised creditors that because sums due to Aztec's secured creditors exceeded the value of Aztec's assets there were no funds to pay any sums due under the NLRB award.

On August 16, 1990, the Union filed with the NLRB an unfair labor practice charge against Zlotoff, Pike, and Starline Sightseeing Tours, Inc. (Starline) -- asserted by the Union to be Aztec's "successor employer group" -- alleging discrimination with respect to the terms and conditions of employment of striking employees ordered reinstated under the NLRB's 1982 and 1988 decisions. The Union's counsel enclosed a cover letter asserting Pike allegedly "returned" Aztec to Zlotoff less than six months earlier. Counsel also asserted: "Under the circumstances, Local 1309 believes that, at least for purposes of remedying Aztec

Bus Lines Inc.'s unfair labor practices, the individuals named as employer are either a continuation of Aztec Bus Lines, successor employers, or both and obligated to remedy Aztec Bus Lines Inc.'s unfair labor practices." In asking the NLRB to consider issuing investigative subpoenas to Zlotoff, Starline and Pike, counsel stated: "We recognize that the Board does not frequently issue investigative subpoenas. However, given the nature and duration of Aztec's unfair labor practices, their adherence to a total disregard of the National Labor Relations Act during the period that they were owned by Pike, and the alleged return of the stock in Aztec by Pike to Zlotoff, and the provisions in the Buy-Sell Agreement under which Mr. Zlotoff and his wife became personally responsible for the debts of Aztec as of December 31, 1986, we think investigative subpoenas are in order."

On September 6, 1990, in declining to issue a complaint on the unfair labor charge filed by the Union, the NLRB's acting regional director wrote: "As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The investigation revealed insufficient evidence to conclude that Starline Tours, Inc., Leonard Zlotoff, Lois Zlotoff, and James A. Pike, or any of them, constitute an alter [ego] or disguised continuation of Aztec Bus Lines, Inc."

Despite demand by George, Zlotoff did not pay her any back wages.

II

SUPERIOR COURT PROCEEDINGS

A

GEORGE'S COMPLAINT

In December 1990 George sued Zlotoff for for breach of contract on a third party beneficiary theory. George alleged

when Zlotoff sold Aztec to Pike and assumed all liabilities as of December 31, 1986, Aztec's liabilities included George's back pay award. George's complaint sought $200,000 compensatory damages for wges, fringe benefits, and interest from April 4, 1981, to December 31, 1986.

B

ZLOTOFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

In November 1991 Zlotoff sought judgment on the pleadings, asserting George's complaint was preempted by federal labor law and the NLRB's exclusive jurisdiction.

After judicially noticing various documents involving the NLRB matters, the superior court granted judgment on the pleadings without leave to amend.[1] The court concluded "the present action is arguably within the jurisdiction of the

National Labor Relations Board." The court entered judgment favoring Zlotoff against George. George appeals.

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1 Generally a motion for judgment on the pleadings is confined to the face of the attacked pleadings. (Baillargeon v. Department of Water & Power (1977) 69 Cal.App.3d 670, 675-676.) However, a court deciding a motion for judgment on the pleadings may also consider -- in addition to the pleaded facts -- any matters properly subject to judicial notice. (Id. at p. 676; Sebago, Inc. v. City of Alameda (1989) 211 Cal.App.3d 1372, 1380.)

III

DISCUSSION

George frames the issue as whether the NLRA preempts her complaint for Zlotoff's alleged breach of his stock purchase agreement with Pike. Asserting her complaint does not raise any issues within the NLRB's jurisdiction or otherwise require the state courts to invade the province of federal labor law, George contends the superior court erred

in granting judgment on the pleadings on the ground of preemption. George asserts one of Aztec's existing liabilities Zlotoff assumed under the 1986 stock purchase agreement was the NLRB's 1982 order that Aztec pay her back wages and fringe benefits. George asserts she seeks only to enforce her third party beneficiary rights under California law arising from that stock purchase agreement. We conclude the judgment on the pleadings must be affirmed because the superior court properly concluded the NLRA preempted George's complaint.

A

THE LAW

The NLRB "'has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions.' [Citation.]" (Hobbs v. Hawkins (5th Cir. 1992) 968 F.2d 471, 478-479.) "In the NLRA, Congress established a

'comprehensive amalgam of substantive law and regulatory arrangements . . . to govern labor-management relations affecting interstate commerce.' [Citation.] A critical element of that amalgam is the NLRB's primary jurisdiction in interpreting and enforcing federal labor law. [Citation.]" (Richardson v. Kruchko & Fries (4th Cir. 1922) 966 F.2d 153, 155.

Sections 7 and 8 of the NLRA "govern both protected 'concerted activities' and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions." (San Diego Building Trades Council, etc. v. Garmon (1959) 359 U.S. 236, 241; 29 U.S.C. §§ 152, 157, 158.) "When it is clear or may fairly be assumed that the activities which a State purports to regulate are

protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." (San Diego Building Trades Council, etc. Garmon, supra, 359 U.S. at p. 244, fn. omitted.)

"When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at p. 245.) Thus, "where the activity which is the subject of suit is either arguably prohibited or arguably protected by the NLRA, state court jurisdiction must yield to the exclusive jurisdiction of the NLRB. [Citation.]" (Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co. (1990) 220 Cal.App.3d 1402, 1407.)[2]

---

[2] "In determining the extent to which state regulation must yield to subordinating federal authority, . . . the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own

procedures, and equipped with its specialized knowledge and cumulative experience . . . ." (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at pp. 241-243.) "[J]udicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." (Id. at p. 243, fn. omitted.)

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at pp. 244-245.)

Our task is to look at the

controversy presented to the superior court and ask whether the NLRB could have adjudicated it instead. (Hobbs v. Hawkins, supra, 968 F.2d at p. 477.) "[W]hen the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." (Sears, Roebuck & Co. v. Carpenters (1978) 436 U.S. 180, 202.) Where the state court claim is a claim that was or could have been brought before the NLRB, such claim is preempted. (Parker v. Connors Steel Co. (11th Cir. 1988) 855 F.2d 1510, 1516-1517.) "The basic rule is that, if the conduct that tne state seeks to regulate is 'actually or arguably' protected under NLRA § 7 or prohibited by NLRA § 8, then 'otherwise applicable state law and procedures are ordinarily pre-empted.' [Citation.]" (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 156.)

ANALYSIS

Zlotoff had the burden to demonstrate George's lawsuit was preempted by federal law. (Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co., supra, 220 Cal.App.3d at p. 1407.) "However, the burden [was] not onerous, since it only" required Zlotoff to "show the claims in issue were 'arguably' subject to exclusive NLRB jurisdiction. [Citation.]" (Id. at pp. 1407-1408.) This record discloses Zlotoff met that burden. Thus, the superior court correctly concluded the NLRA preempted George's complaint.

1

Generally the remedying of unfair labor practices is an administrative -- not judicial -- function given to the NLRB's sole discretion. (National Labor Relations Bd. v. Seven-Up Bottling Co. (1953) 344 U.S. 344, 346.) In enacting the NLRA, Congress invested the "Board and

not the courts with broad powers to fashion remedies that will effectuate national labor policy." (NLRB v. Food Store Employees (1974) 417 U.S. 1, 10.) The NLRB has exclusive jurisdiction over enforcement of its own orders. (Amalgamated Utility Workers v. Consol. Edison Co. (1940) 309 U.S. 261, 265-266; Solo Cup Company v. N.L.R.B. (4th Cir. 1964) 332 F.2d 447, 449; National Labor Relations Bd. v. Sunshine Mining Co. (9th Cir. 1942) 125 F.2d 757, 761.) "If the NLRB is exclusively responsible for redressing unfair labor practices, which it is, this must necessarily include ensuring that the remedy prescribed is administered to its conclusion." (N.L.R.B. v. State of Ill. Dept. of Employment Sec. (N.D. Ill. 1991) 777 F.Supp. 1416, 1419.) ". . . 'Because the relation of remedy to policy is peculiarly a matter for administrative competence,

courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" (National Labor Relations Board v. Gullett Gin Co. (1951) 340 U.S. 361, 363, quoting Phelps Dodge Corp. v. National Labor Relations Bd. (1941) 313 U.S. 177, 194.)

George contends her complaint was not preempted because it assertedly sought damages only for Zlotoff's alleged breach of his stock purchase agreement with Pike. However, George could not avoid preemption simply by framing her lawsuit as a state breach of contract action. (Richardson v. Kruchdo & Fries, supra, 966 F.2d at p. 158.)[3]

---

[3] "The Supreme Court has emphasized that mere labels are not relevant in the labor preemption context; rather, labor

preemption is '"concern[ed] . . . with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered."' [Citations.]"
(Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 158, italics in original; see also Motor Coach Employees v. Lockridge (1971) 403 U.S. 274, 292; Parker v. Connors Steel Co., supra, 855 F.2d at pp. 1516-1518.) In Machinists Automotive Trades Dist. Lodge v. Peterbilt Motors Co., supra, 220 Cal.App.3d 1402, the appellate court stated: "Even though appellants might attempt to recast this misconduct as a breach of contract, it remains within the NLRB's exclusive jurisdiction." (Id. at p. 1412.)

Although cast as a complaint for Zlotoff's asserted breach of his promise under the stock purchase agreement, the liability George sought to enforce was Zlotoff's promise to satisfy Aztec's obligation to George under the NLRB order. Thus, to prevail on her complaint George would be required to prove the existence, continuing validity and enforceability of the NLRB order. Those issues bearing on enforcement of the NLRB order were within the NLRB's exclusive jurisdiction.

(National Labor Relations Bd. v. Seven-Up Bottling Co., supra, 344 U.S. at pp. 346-349; Amalgamated Utility Workers v. Consol. Edison Co., supra, 309 U.S. at pp. 265-266; Solo Cup Company v. N.L.R.B., supra, 332 F.2d at p. 449; Stewart Die Casting Corp. v. National Labor Rel. Board (7th Cir. 1942) 132 F.2d 801, 804; National Labor Relations Bd. v. Sunshine Mining Co., supra, 125 F.2d at p. 761.) In sum, enforcement of NLRB orders is an area which must be free from state regulation to leave national policy unhampered. (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 158.)

George's lawsuit effectively sought enforcement of the NLRB order and her ability to claim under that order. Enforceability of the NLRB order and Zlotoff's asserted liability to George for such order were issues at least colorably within the NLRB's exclusive jurisdiction.[4]

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[4] Zlotoff's alleged refusal to comply with the NLRB order could constitute as much a violation of the NLRA as Aztec's original labor law violations. (Liberty Electronics Corp., etc. (1963) 143 N.L.R.B. 605, 617.)

Hence, we cannot say as a matter of law Zlotoff's assumption of Aztec's obligation under the NLRB order would be mere peripheral concern to the NLRA. (Farmer v. Carpenters (1977) 430 U.S. 290, 296-297.) Although pleaded as a claim for breach of contract on a third party beneficiary theory, George's complaint was in reality an attempt to enforce the NLRB order against parties who once were Aztec shareholders.[5]

---

[5] Contrary to George's contention, her complaint was preempted regardless of the capacity in which defendant Zlotoff wa sued. '[S]tate]-law claims are subject to Garmon preemption even when the defendant is neither a union, an employer, nor the employer's agent. Whether state-law claims are preempted under Garmon is determined not by the identity of the

party against whom the claims are asserted, but rather by the issues that those claims require a court to adjudicate. The dangers that Garmon doctrine seeks to avert -- 'the potential conflict of two law enforcing authorities, with the disharmonies inherent in two systems, . . . of inconsistent standards of substantive law and differing remedial schemes,' [citation] -- are present whenever courts are required to review conduct that is arguably prohibited or protected by the NLRA, no matter what the identity of the party against whom the state-law claims are asserted. Thus, . . . the identity of the party defendant is not determinative; a state-law claim is preempted 'if the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRA.' [Citations.]" (Richardson v. Kruchko & Fries, supra, 966 F.2d at pp. 156-157, italics in original.)

Enforcement of such obligation was outside the state court's power to adjudicate. (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at p. 243.) Despite George's artful pleading, her remedy if any was solely with the NLRB. Thus, George may not avoid preemption by framing her attempted enforcement of the NLRB order as a state law breach of

contract action. (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 158.)

2

As noted, in August 1990 the Union filed with the NLRB an unfair labor practice charge seeking to hold Zlotoff and others liable for remedying Aztec's unfair labor practices involved in the NLRB's 1982 and 1988 decisions on the theory they were either a continuation of Aztec, a successor employer, or both. The Unin requested the NLRB issue investigative subpoenas for various reasons including the provisions of the stock purchase agreement where Zlotoff became personally responsible for Aztec's debts as of December 31, 1986. In declining to issue a complaint on the Union's charge, the NLRB stated its investigation revealed insufficient evidence to conclude Zlotoff constituted an alter ego or disguised continuation of

Aztec.

George contends the NLRB's determination Zlotoff was not Aztec's alter ego or successor employer did not constitute a finding on Zlotoff's alleged separate and independent liability to George for breach of the stock purchase agreement. However, as noted, George's complaint was preempted regardless of the capacity in which Zlotoff was sued. (Richardson v. Kruchko & Fries, supra, 966 F.2d at pp. 156-157.) Further, although different parties were technically involved, George effectively had her "day in court" before the NLRB when that agency rejected the Union's August 1990 unfair labor practice charge. A claim virtually identical to the one before the superior court was the basis for the charge before the NLRB in August 1990. The NLRB determined Zlotoff was not liable under NLRA law for the earlier NLRB orders

against Aztec.[6]

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[6] As noted, the Union raised before the NLRB the matter of the 1986 stock purchase agreement. Arguably the NLRB could apply state third party beneficiary law in determining the enforceability against Zlotoff of the NLRB order naming Aztec. (Liberty Electronics Corp., etc., supra, 143 N.L.R.B. at p. 617; see Sinko Manufacturing and Tool Company (1965) 154 N.L.R.B. 1474 and Emerson Electric Company (1969) 176 N.L.R.B. 744, where the NLRB also exercised its jurisdiction to decide claims seeking to enforce NLRB orders when under the language of Buy-Sell Agreements buyers allegedly agreed to assume liability for those orders.) Similar to those cases, Zlotoff's alleged liability arose from the sale of stock in a business where he agreed to assume responsibility for Aztec's existing liabilities.

George may not now relitigate the same claim in state court. Moreover, preemption by the NLRB's exclusive jurisdiction is particularly appropriate where, as here, the claim has been previously brought before the NLRB and then after rejection is recast as a state law claim. (Parker v. Connors Steel Co.,

supra, 855 F.2d at p. 1517.)[7]

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[7] In Parker v. Connors Steel Co., supra, 855 F.2d 1510, the court stated: "We believe that the primary jurisdiction rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court. [Citation.]" (Id. at p. 1517.) The court also stated: "By initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims." (Ibid.)

Finally, attempted enforcement through this state court lawsuit was preempted even though the NLRB declined to offer a remedy. (Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 157.)[8]

---

[8] "[T]he Supreme Court has made clear that state-law claims may be preempted even when a plaintiff is without a remedy under the NLRA. See Guss v. Utah Labor Relations Bd., 353 U.S. 1 . . . (1957) (holding that state-law claims are preempted even when the NLRB refuses to assume jurisdiction). . . . That state law might provide remedies unavailable under the NLRA has never been a basis for avoiding Garmon preemption. [Citations.]"

(Richardson v. Kruchko & Fries, supra, 966 F.2d at p. 157.)

In sum, state court adjudication of George's complaint posed a danger of conflict with federal labor law as determined by the NLRB in rejecting the Union's August 1990 charge. By essentially asking the superior court to hear a claim the NLRB already rejected on the merits, George's state complaint potentially threatened interference with the national policy of industrial relations. (San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. at p. 243.) Permitting the superior court to assert jurisdiction over George's lawsuit would have required that court to exercise "power which might interfere with the policy behind preemption, i.e., the need to obtain uniform interpretation and application of federal labor law." (Balog v. LRJV, Inc. (1988) 204 Cal.App.3d 1295, 1308-1309.)

Further, only the NLRB itself -- no an individual employee -- may enforce an NLRB order. (Amalgamated Utility Workers v. Consol. Edison Co., supra, 309 U.S. at p. 265; Stewart Die Casting Corp. v. National Labor Rel. Board, supra, 132 F.2d at pp. 803-804; National Labor Relations Bd. v. Sunshine Mining Co., supra, 125 F.2d at p. 761.) Although George might properly contest the NLRB order, she had no individual standing to enforce that order in state court or otherwise. (Amalgamated Utility Workers v. Consol. Edison Co., supra, at p. 265; Steward Die Casting Corp. v. National Labor Rel. Board, supra, at p. 804.) Thus, again, permitting state court adjudication of George's complaint seeking enforcement of an NLRB back pay order would directly conflict and interfere with federal labor policy and the NLRB's exclusive jurisdiction over matters of compliance

and enforcement of its orders. Thus, the superior court may not interfere with national labor policy by permitting George's attempt to enforce in state court a back pay order of the NLRB.

IV

CONCLUSION

The premeption doctrine of San Diego Building Trades Council, etc. v. Garmon, supra, 359 U.S. 236, applies to conduct or activity which is arguably protected or arguably prohibited by the NLRA. The preemption doctrine applies to George's complaint because her lawsuit essentially seeks enforcement of an NLRB order, a matter governed by the NLRA. Thus, the superior court properly concluded George's complaint was preempted as arguably within the jurisdiction of the NLRB. The superior court correctly granted judgment on the pleadings favoring Zlotoff.

DISPOSITION

The judgment is affirmed.

KREMER, P.J.

WE CONCUR:

TODD, J.

FROEHLICH, J.

APPENDIX B

B-1

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

HARLINE K. GEORGE, now known as HARLINE K. PROCHAZKA) Plaintiff	CASE NO. 632268 IC JUDGE: Robert J. O'Neill
v.	ORDER AND JUDGMENT ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
LEONARD ZLOTOFF and LOIS ZLOTOFF) Defendants	

The Motion of Defendants LEONARD ZLOTOFF and LOIS ZLOTOFF for judgment on the pleadings came on regularly for hearing by way of telephonic ruling before this Court on Friday, November 22, 1991, in Department 34, Honorable Robert J. O'Neill, Judge Presiding.

After full consideration of the Plaintiff's Complaint and the authorities

submitted by counsel, the Court ruled judicial notice taken as requested by both sides; Motion for Judgment on the Pleadings granted without leave to amend as Court finds the present action is arguably within the jurisdiction of the National Labor Relations Board; Defendants' request for attorneys fees and costs off-calendar as not adequately supported in the moving papers pursuant to CRC 313(b); case is dismissed in its entirety.

No party to the action timely requested oral argument on the Court's telephonic ruling of November 22, 1991.

IT IS THEREFORE ORDERED that the said Motion for Judgment on the Pleadings is granted, with prejudice, and that judgment is hereby entered in favor of Defendants LEONARD ZLOTOFF and LOIS ZLOTOFF, and against Plaintiff HARLINE K. GEORGE, now known as HARLINE K. PROCHAZKA.

[Handwritten text: "($17,510.50) Costs awarded defts Zlotoff $17,510.50"]

Dated: JAN - 6 1992

/s/_____
Robert J. O'Neill
Judge of the Superior Court

APPROVED AS TO FORM.

Dated: 12/31/91

/s/_____
Marilynn Mika Spencer
RICHARD D. PROCHAZKA, APC
Attorney for Plaintiff

APPENDIX C

C-1

Relevant Provisions of Section 29, United States Code

§152. Definitions

When used in this subchapter --

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organiation (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or

because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any

Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

. . .

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

. . .

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§158. Unfair labor practices.

(a) It shall be unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining

unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify and discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(emphases in original)

§160. Prevention of unfair labor practices -- Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less

than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.
(emphasis added)

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Supreme Court, U.S.
FILED
DEC 9 1993
OFFICE OF THE CLERK

(2)

No. 93-775

In The

Supreme Court of the United States

October Term, 1993

HARLINE K. GEORGE, *et al.*,

Petitioner,

v.

LEONARD ZLOTOFF and LOIS ZLOTOFF,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State Of California

RESPONDENT'S BRIEF IN OPPOSITION

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Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flower Co., 369 U.S. 95 (1962) 10

Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903 (1967) 6, 10

FEDERAL STATUTES

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) 9

1. INTRODUCTION

There is absolutely no basis for this Court to review Harline K. George, now known as Harline K. Prochazka's ("George") writ of certiorari. The Fourth District Court of Appeal's decision is not in conflict with other decisions on federal labor law preemption nor are there unsettled or important questions of federal law raised by this Petition.

The Fourth District Court of Appeal's 17 page unpublished opinion was based upon a careful review and analysis of the evidence and law. After such review the Court of Appeal concluded that plaintiff's action was arguably preempted by the exclusive jurisdiction of the National Labor Relations Board ("NLRB") as George's lawsuit sought to enforce an NLRB order, a matter governed exclusively by the National Labor Relations Act ("NLRA"). There is no federal court authority inconsistent with this ruling. In fact, all reported case law compels the same conclusion reached by the Fourth District. While George may not agree with the Fourth District's analysis and decision, there is absolutely no grounds for a petition to the U.S. Supreme Court.

2. STATEMENT OF THE CASE

On September 30, 1982, the NLRB ordered that a corporation known as Aztec Bus Lines, Inc. ("Aztec") reinstate and pay back wages to George, as well as other similarly situated bus drivers. That decision, which forms the basis for George's right to damages in this action, arose out of a strike by Aztec employees, on or about

August 23, 1980, and George's and the other strike employees' unconditional offer to return to work in April of 1981. The NLRB found that, by failing to reinstate the plaintiff, as well as other strikers, Aztec Bus Lines had violated Sections 8(a)(1) and (3) of the NLRA, and ordered the strikers reinstated, with back pay from April 4, 1981 until the date of reinstatement.[1]

In 1979, prior to the strike and the subsequent proceedings before the NLRB, the respondents herein, Leonard and Lois Zlotoff ("Zlotoff"), sold their interest in Aztec Bus Lines to an individual known as Augustus Zemba. Subsequent to the decision by the NLRB, Mr. Zemba defaulted on installment payments to the Zlotoffs and they regained ownership of Aztec.

On December 31, 1986, the Zlotoffs agreed in writing to sell their stock in Aztec to a James Pike. The Stock Purchase Agreement provided in part that: "It is the intent of the parties that seller [Zlotoffs] bear the liabilities existing as of December 31, 1986, and buyer [Pike] bear the risk of operations thereafter."

On July 27, 1989, the United States Court of Appeal for the District of Columbia Circuit confirmed the NLRB award. On September 12, 1989, the United States District Court for the Southern District of California entered judgment in favor of the union and against Aztec requiring

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[1] This Statement of the Case is taken from the Fourth District Court of Appeal's Decision, which is attached to George's Petition. The factual background contained in that decision, which is undisputed, was based upon the allegations of George's Complaint and those matters of which the Fourth District took judicial notice.

compliance with the orders of the NLRB, including reinstatement and back pay.

On August 16, 1990, the union filed an unfair labor practice charge with the NLRB as against the Zlotoffs, Pike and Star Line Sightseeing Tours, Inc. ("Starline"), alleging that these individuals and entity were Aztec's "successor employer group" and that they had violated the NLRB's 1982 and 1988 decisions and orders by failing to reinstate and pay back pay to striking workers. In support of this charge, the union's counsel asserted that Zlotoffs were liable under the 1986 Stock Purchase Agreement for the reinstatement and back pay order issued by the NLRB.

On September 6, 1990, the NLRB's acting regional director declined to issue a complaint on the unfair labor practice charge filed by the union, stating in part that:

> As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The investigation reveals insufficient evidence to conclude that Starline Tours, Inc., Leonard Zlotoff, Lois Zlotoff, and James A. Pike, or any of them, constitute an alter ego or a disguised continuation of Aztec Bus Lines, Inc.

Shortly after this refusal by the NLRB to enforce its own order against the Zlotoffs, George filed a Complaint on December 29, 1990, in San Diego Superior Court alleging that she was the third-party beneficiary of the 1986 Stock Purchase Agreement, by which the Zlotoffs had purportedly agreed to accept liability for the NLRB order. George alleged that by virtue of this Agreement, she was entitled to enforce the NLRB order against the Zlotoffs in state court.

Subsequent to the filing of George's Complaint in state court, the Zlotoffs filed a motion for judgment on the pleadings on November 3, 1991. This motion was based upon the allegation that, since the subject matter of George's Complaint was the same as a claim that could have been (and in fact was) presented to the NLRB, it was preempted by the exclusive jurisdiction of that agency over labor law matters. On November 22, 1992, the trial court granted judgment on the pleadings in Zlotoffs' favor, without leave to amend. In reaching its decision, the trial court concluded that "the present action is arguably within the jurisdiction of the National Labor Relations Board." The court then entered judgment in favor of the Zlotoffs and dismissed George's Complaint with prejudice.

George filed a notice of appeal on this ruling on March 5, 1992. After briefing by the parties and oral argument, the Court of Appeal on May 12, 1993 issued a 17 page unpublished decision upholding and affirming the decision by the San Diego Superior Court. The Fourth District Court of Appeal held that the Zlotoffs had met their burden showing that the plaintiff's claim, although artfully pleaded as a breach of contract action, was "arguably" within the jurisdiction of the NLRB as it was in reality an attempt to enforce an order of that agency.

George now takes issue with the Fourth District Court of Appeal's decision in this Petition for Review. However, as the following discussion will reveal, there are simply no grounds for review of the Fourth District's decision by this Court.

3. NO GROUNDS EXIST FOR GRANTING CERTIORARI.

A. The Fourth District Court of Appeal Decision Does Not Conflict With Any United States Supreme Court Decisions On *Garmon* Preemption.

Contrary to George's unsupported assertions in her Petition, the scope of federal labor law preemption has not been narrowed in recent years. Rather, since the original rule for federal labor law preemption was laid down in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court, and federal courts of appeal, have refined and, indeed, *expanded* the coverage of preemption to ensure that there is no conflict between state courts and federal administration of labor disputes. This case law makes clear that the Fourth District Court of Appeal was well within the scope of U.S. Supreme Court decisions when it held that the plaintiff's state court claim attempting to enforce an order of the NLRB was preempted.

The principles of labor preemption, which began with *San Diego Bldg. Trades v. Garmon, supra*, are well established. With the NLRA, Congress established a "comprehensive amalgam of substantive law and regulatory arrangements . . . to govern labor-management relations affecting interstate commerce." *Local 926, Int'l Union of Operating Engrs. v. Jones*, 460 U.S. 669, 675-76, 103 S. Ct. 1453 (1983). A critical element of that amalgam is the NLRB's primary jurisdiction in interpreting and enforcing federal labor law. *Garmon, supra*, 359 U.S. at 242-45. Labor preemption serves to ensure that state law does not frustrate either the substantive policies established by the

NLRA or the regulatory mechanisms through which those policies are implemented. "[T]he broad powers conferred by Congress upon the National Labor Relations Board to interpret and enforce" the federal labor laws "necessarily imply that potentially conflicting rules of law, of remedy, and of administration cannot be permitted to operate." *Vaca v. Sipes*, 386 U.S. 171, 178-79, 87 S. Ct. 903, 910 (1967) [quoting *Garmon*]. Furthermore, "[C]entralized administration of specially designed procedures [is] necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid [the] diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 192, 98 S. Ct. 1745, 1755 (1978).

In *Garmon*, this Court stated the basic rule of preemption is that, if the conduct that the state seeks to regulate is "actually or arguably" protected under Sections 7 or 8 of the NLRA, then the action is preempted. *Id.* at 245. Since then the test has been refined and broadened to determine which conduct is arguably subject to the jurisdiction of the NLRB. The current statement of federal labor law preemption, as laid down in *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters, supra*, 436 U.S. at 180, is as follows:

> The critical inquiry is not whether the state is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the labor board.

Id. at 197.

Thus, in order to determine whether a particular controversy presented to the state court is preempted, it must be determined whether it was one that could have been presented to the NLRB. If it is a claim that could have been brought before the NLRB, it is preempted. *Sears, Roebuck & Co. v. San Diego County Dist. Counsel of Carpenters, supra*, 436 U.S. at 202. Furthermore, it is only necessary that the party arguing for preemption show that the controversy is "arguably" subject to the NLRB's exclusive jurisdiction as, in cases where the answer is not clear, the determination must be made in the first instance by the NLRB itself. *San Diego Bldg. Trades Council v. Garmon, supra*, 359 U.S. at 244-45.

George's state court Complaint fell well within these rules of preemption. As correctly found by the Fourth District Court of Appeal, George's Complaint was nothing more than an attempt to enforce an order of the NLRB. Enforcement of the NLRB orders is a matter given exclusively to the NLRB, not courts. *National Labor Relations Bd. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265, 266 (1940).

Furthermore, George cannot escape preemption by attempting to artfully plead her claim as one for breach of contract. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1516-1518 (11th Cir. 1988); *Richardson v. Krucko & Fries*, 966 F.2d 153, 158 (4th Cir. 1992). This Court has emphasized that the labels given to claims are not relevant in the labor preemption context. Rather, courts are concerned with "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Local 100, United Ass'n of Journeymen v.*

Borden, 373 U.S. 690, 698 (1963); *Garmon, supra*, 359 U.S. at 246; *Jones, supra*, 460 U.S. at 675-84.

It also is of no significance that the defendants in this action, the Zlotoffs, are not currently an "employer" of George. Such fact has *no* bearing on whether George's claim is preempted. State law claims are subject to *Garmon* preemption even where the defendant is nether a union, an employer nor the employer's agent. Whether state law claims are preempted under *Garmon* is determined not by the identity of the party against whom the claims are asserted but rather the issues that those claims require a court to adjudicate. It is enough if the conduct relied on to prove a crucial element in the state action is conduct that is arguably covered by the NLRA. *Jones, supra*, 460 U.S. at 682; *Richardson v. Krucko & Fries, supra*, 966 F.2d at 156-57 [lawsuit filed against employer's counsel held to be preempted]; *Lumber Prods. Industrial Workers Local #1054 v. West Coast Industrial Relations Ass'n*, 775 F.2d 1042, 1049 (9th Cir. 1985).

George also contends that, because she has sued someone that does not fall within the category of an employer, the NLRA is unable to act on her claim. This argument is likewise irrelevant to the preemption analysis. This Court has made clear that state law claims may be preempted even when a plaintiff is without a remedy under the NLRA. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 77 S. Ct. 598 (1957) [holding that state law claims are preempted even when the NLRB refuses to assume jurisdiction]. The fact that state law might provide remedies unavailable under the NLRA has never been a basis for avoiding *Garmon* preemption. *Garmon, supra*, 359 U.S. at 246-47; *Jones, supra*, 460 U.S. at 684.

At any rate, the NLRB clearly would have the power to rule on George's claim. The NLRB has on many occasions enforced NLRB orders against individuals or entities who, by contract, have allegedly agreed to assume liability for such orders. *Liberty Elecs. Corp.*, 143 N.L.R.B. 605, 617 (1963); *Sinko Mfg. & Tool Co.*, 154 N.L.R.B. 1474 (1965); *Emerson Elec. Co.*, 176 N.L.R.B. 744 (1969).

As the foregoing authority makes clear, the Fourth District Court of Appeal's decision was well within this Court's test for *Garmon* preemption. The decision is wholly supported by and consistent with the holdings of this Court and the federal courts. In fact, if George's argument were accepted, it would create a large loophole in the *Garmon* preemption scheme. George has sought to escape the broad reach of *Garmon* preemption by artfully pleading her claim to enforce the NLRB order as one for breach of a third-party beneficiary contract and by attempting to argue that the Zlotoffs were not employers within the scope of the NLRA. Permitting circumvention of the *Garmon* preemption doctrine through such artful pleading of claims, as was done in this case, would allow parties to take labor disputes to court, a result that would undermine the NLRB's primary jurisdiction in labor law and raises a substantial risk of conflict between federal and state law in this area. *Richardson v. Krucko & Fries*, *supra*, 966 F.2d at 157.

B. The Section 301 Cases Cited By George Are Completely Irrelevant To A *Garmon* Preemption Analysis.

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), gives both federal and state courts

subject matter jurisdiction over suits alleging a breach of a collective bargaining agreement between the employer and a labor organization. Therefore, if conduct that constitutes an unfair labor practice also violates the collective bargaining agreement, federal and state courts and the NLRB exercise concurrent jurisdiction. *Smith v. Evening News Ass'n*, 371 U.S. 195, 197, 83 S. Ct. 267 (1962); *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*, 845 F.2d 1250, 1252 (4th Cir. 1988). Accordingly, case law involving suits brought under Section 301 of the LMRA are completely irrelevant to a discussion of *Garmon* preemption, which involves the *exclusive* jurisdiction of the NLRB. *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flower Co.*, 369 U.S. 95, 101, n.9 (1962); *Smith v. Evening News Ass'n, supra*, 371 U.S. at 197-98; *Vaca v. Sipes, supra*, 386 U.S. at 179-80; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245, n.5 (1962).

In this case, George is not filing suit seeking to enforce the terms of a collective bargaining agreement pursuant to Section 301 of the LMRA. Accordingly, the cases cited by George at pages 18 through 26 of her Petition are inapplicable and irrelevant to a determination of whether the Fourth District Court of Appeal's decision on preemption was correct.

C. Allowance Of George's State Court Complaint Threatens Interference With National Policy Regarding Labor Relations.

The rationale for preempting state law claims that are only "arguably" within the NLRB's jurisdiction is that to do otherwise would pose a great danger of conflict

between federal labor law and state law. *San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. at 244.

The danger of interference with national labor policy is particularly evident here where George brought the same claim before the NLRB in her union's August 1990 unfair labor practice charge. The NLRB determined on the merits that the Zlotoffs were not liable under NLRA law for earlier NLRB orders against Aztec. In doing so, the NLRB rejected the attempt to hold the Zlotoffs liable pursuant to the 1986 Stock Purchase Agreement. Because George had her "day in court" before the NLRB, she may not now attempt to relitigate the same claim in state court. Preemption by the NLRB's exclusive jurisdiction is particularly appropriate where, as here, the claim has been previously brought before the NLRB, and then, after rejection, is recast as a state law claim. *Parker v. Connors Steel Co., supra,* 855 F.2d at 1517. By initially bringing this claim before the NLRB first, George has "implicitly recognized the Board's jurisdiction over [her] claims." *Id.*

A danger of conflict with federal labor law is further shown by the fact that only the NLRB itself, not an individual employee, may enforce an NLRB order. *Amalgamated Util. Workers v. Consolidated Edison Co., supra,* 309 U.S. at 265; *Stewart Die Casting Corp. v. National Labor Relations Bd.,* 132 F.2d 801, 803-04 (7th Cir. 1942). Although George might properly contest the NLRB order, she had no individual standing to enforce that order in state court or otherwise. *Amalgamated Util. Workers v. Consolidated Edison Co., supra,* at 265. Thus, permitting state court adjudication of George's Complaint seeking enforcement of an NLRB back pay order would *directly* conflict and interfere with federal labor policy and the

NLRB's exclusive jurisdiction over matters of compliance and enforcement of its order.

4. CONCLUSION

The broad application given to federal labor law preemption requires that state courts may not assume jurisdiction over claims that are even "arguably" within the exclusive jurisdiction of the NLRB. The Fourth District Court of Appeal correctly found that plaintiff's claim, which was in essence an attempt to enforce an order of the NLRB, fell squarely within that preemption doctrine. George has not cited to this Court a single case that is in conflict the Fourth District's decision. In fact, all U.S. Supreme Court case authority addressing the parameters of *Garmon* preemption are consistent with and supportive of the Fourth District's ruling. Accordingly, no basis for review of the Fourth District Court of Appeal's decision exists in this case, and George's Petition must be denied.

Respectfully submitted,

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FILED
DEC 21 1993

(3)

Case No. 93-775

In The
SUPREME COURT of the UNITED STATES

October Term, 1993

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HARLINE K. GEORGE, et al.,

Petitioner,

v.

LEONARD ZLOTOFF and
LOIS ZLOTOFF,

Respondents.

==========

Petition For A Writ Of Certiorari To The California Court Of Appeal

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PETITIONER'S REPLY BRIEF

==========

RICHARD D. PROCHAZKA
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San Diego Building Trades
Council v. Garmon
359 U.S. 236 (1958) 3, 7

I. INTRODUCTION

Respondents made numerous factual and other misstatements in their Brief in Opposition. These misstatements only serve to mislead this Honorable Court. Petitioner Harline K. George accordingly submits this Reply Brief to correct Respondents' misstatements.

II. SOLID GROUNDS EXIST FOR GRANTING THE WRIT AND THE RESPONDENTS HAVE FAILED TO SHOW OTHERWISE

A. George's State Court Complaint Did Not Invoke Federal Labor Law, As Respondents Claim

In their Brief in Opposition, the Zlotoffs boldly assert that in her complaint, "George alleged that by virtue of this [Stock Purchase] Agreement, she was entitled to enforce the NLRB order against the Zlotoffs in state court." (Respondents' Brief in Opposition, page 3,

"Opposition, p. 3")

This statement by the Zlotoffs is completely untrue. George's complaint in no way alleged a right to enforce the NLRB order.

The issues in George's state court complaint are fundamental to the correct resolution of the question presented for review in this Petition. It is therefore important that there be no confusion on this point.

So that the Court may see for itself the incorrect and misleading nature of the Zlotoffs' statement, quoted above, Appendix A to this Reply Brief is a reformatted copy of George's state court complaint, omitting only the Exhibit attached to the complaint (the Stock Purchase Agreement). Paragraphs 10-13 of the complaint set forth George's breach of contract theory; clearly, George did not allege a right to enforce the NLRB order

in state court.

B. The Law Does Not And Cannot Support Respondents' Primary Preemption Argument

Although it is at odds with the law, Respondents attempt to argue that the breadth of the preemption rule in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1958) has expanded over time. (Opposition, p. 5) Short of that statement itself, there is no other argument -- and certainly no legal support -- for such an assertion, anywhere in Respondents' Brief.

In contrast, Petitioner George provided numerous decisions of this United States Supreme Court which explicitly demonstrate that this Court has found no NLRB preemption in an increasing number of situations, and has endorsed state court adjudication of a growing number of

complaints. Petitioner George refers the Court to her Petition for a Writ of Certiorari to the California Court of Appeal, at pages 12-13 ("Petition" pp. 12-13), for citations to these cases.

Respondents' assertion to the contrary is not supported by argument or law, and should be discounted.

C. George's State Court Claim Was Completely Distinct From The Union's NLRB Claim

There is nothing in the record to support factual misstatements by the Respondents that Petitioner George first brought "her" claim or an "identical" claim before the NLRB. (Opposition, pp. 8-9; p.11) Petitioner will not burden the record by appending to this brief copies of the voluminous documentation which demonstrates the falseness of this claim.

The record of the parallel proceeding

brought by Amalgamated Transit Union against Aztec Bus Lines, Inc. clearly discloses that Petitioner never filed any charge or complaint against Aztec Bus Lines, Inc. or the Respondents, except for the existing proceeding. Petitioner refers this Court to her Petition at page 8 and pages 15 through 16 for an exposition of how George's state court complaint materially differed from the Union's NLRB complaint with respect to issues, remedy, and parties.

D. The Question Presented Is One Of First Impression For The State And The Federal Courts; This Court's Decision Will Ensure That The Federal Preference For Consistency Is Maintained

This Court frequently decides questions which have never before been

directly addressed by any court. In such circumstances, this Court regularly analyzes its own decisions, and those from other courts, regarding the most closely related issues.

Rather than encouraging this established and comprehensive approach, the Zlotoffs argue that this Court should completely disregard its own decisions, even in a case of first impression. (Opposition, pp. 9-10)

If the Zlotoffs' approach is followed, novel issues will never be resolved, and the likelihood for conflicting appellate decisions greatly increases. Therefore, Petitioner George welcomes this Court's consideration of all relevant authority in the instant case of first impression.

III. CONCLUSION

The Respondents failed to address the issue presented to this Court: Is a creditor's state court enforcement of a "pay all bills" provision in a corporate stock sales agreement preempted by the National Labor Relations Act? The lower court decisions conflict with this Court's decisions in Garmon, supra, and the issue before this Court is one of first impression, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

A-1

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C O P Y
KENNETH E. MARTONE
Clerk of the Superior Court

DEC 28, 1990

By: C. Ghio, Deputy
Business

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

HARLINE K. GEORGE, now known as HARLINE K. PROCHAZKA,	) CASE NO. 632268
Plaintiff,	) COMPLAINT FOR DAMAGES AND BREACH OF CONTRACT
v.	) (General Civil)
LEONARD ZLOTOFF and LOIS ZLOTOFF,	)
Defendants.	)

Plaintiff alleges:

1. Aztec Bus Lines, Inc. ("Aztec") was a California corporation formerly doing business in San Diego, California.

2. Prior to August 23, 1980, Leonard Zlotoff and Lois Zlotoff owned controlling interest in Aztec Bus Lines, Inc.

3. Harline K. George, now known as Harline K. Prochazka ("Plaintiff") commenced employment with Aztec prior to August 23, 1980.

4. At all times relevant to this complaint, Plaintiff was represented, for purposes of collective bargaining, by Bus Drivers Local Division 1309 of the Amalgamated Transit Union, AFL-CIO ("Union").

5. Due to unfair labor practices committed by Aztec, the represented employees of Aztec went on strike on or about August 23, 1980.

6. Plaintiff and other striking

employees of Aztec made an unconditional offer to return to work in April of 1981.

7. On or about September 30, 1982, a National Labor Relations Board ("NLRB") Administrative Law Judge ordered Aztec to reinstate the Plaintiff and others to their positions as bus drivers and to pay them all lost wages and other benefits from April 4, 1981 until the date of their reinstatement.

8. Aztec failed and refused to reinstate Plaintiff to her position as a bus driver. Aztec failed and refused to pay Plaintiff any backpay or fringe benefits.

9. As of December 31, 1986 Leonard Zlotoff and Lois Zlotoff ("Defendants") owned 900 of the 1,000 shares of common stock of Aztec.

10. Defendants contracted with James V. Pike ("Pike") to sell their Aztec

stock, at a time subsequent to the NLRB Administrative Law Judge's Order to Aztec to reinstate the Plaintiff.

11. On or about December 31, 1986 Defendants executed a written Stock Purchase Agreement to sell their shares of Aztec common stock to Pike. A copy of that Agreement is attached hereto marked Exhibit "A" and incorporated herein by this reference as though fully set forth.

12. Under the terms of the Stock Purchase Agreement, Defendants agreed with the Buyer that "it is the intent of the parties that Seller [Defendants herein] bear the liabilities existing as of December 31, 1986, and Buyer [Pike] bears the risk of operations thereafter."

13. When Defendants contracted to sell Aztec, and therein assumed all liabilities as of December 31, 1986 per their Stock Purchase Agreement with Pike,

Aztec's liabilities included Plaintiff's backpay award.

14. On July 22, 1988 the NLRB confirmed its Administrative Law Judge's Order to Aztec to reinstate the Plaintiff and to pay all backpay due.

15. Aztec continued to fail and refuse to reinstate Plaintiff. Aztec has failed and refused to pay any backpay or any fringe benefits to Plaintiff during times relevant herein.

16. Aztec has effected an Assignment for the Benefit of Creditors as of March 20, 1990, through the Hamer Group, as Assignee.

17. The Hamer Group has advised creditors that sums due secured creditors of Aztec exceed the value of Aztec's assets and as a result, there are no funds to pay any sums due under the NLRB's award.

18. As a result of the Administrative Law Judge's Order, subsequently confirmed by the National Labor Relations Board and the U.S. Court of Appeals, D.C. Circuit, Aztec owed Plaintiff wages and fringe benefits from April 4, 1981 to December 31, 1986 in an amount of approximately $200,000.00 including interest accrued and accumulated under the NLRB's rules governing backpay calculation.

19. Defendants have failed and refused to pay Plaintiff any of the backpay due to her.

20. Plaintiff has demanded payment from Defendant Leonard Zlotoff, but no such payment has been made.

WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, as follows:

1. For compensatory damages in the

sum of $200,000.00;

2. For interest at the legal rate, calculated from December 31, 1986 until date of payment;

3. For reasonable attorneys' fees according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the Court may deem proper.

Dated: December 28, 1990

RICHARD D. PROCHAZKA,
A Professional Corporation

By_/s/_____
Marilynn Mika Spencer